

## **Proposed Legal Profession Conduct Rules**

**Legal Aid NSW submission**

**to the Legal Services Council of Australia**

**January 2015**

### **Introduction**

Legal Aid NSW is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners.

Legal Aid NSW welcomes the opportunity to provide comment and feedback on the proposed Legal Profession Conduct Rules for solicitors (Solicitors' Rules).

Legal Aid NSW notes that the proposed Solicitors' Rules mirror the solicitor rules that are currently in place in New South Wales. Legal Aid NSW supports the overall framework and underpinning principles of the National Legal Profession Reform.

During the 2010 consultation process the Solicitors' Rules included Commentary which we found extremely useful in understanding how some of the Rules could be applied. This was particularly the case in the area of confidentiality and conflict of interest. The current consultation process has not included the Commentary. Legal Aid NSW would like to see the Commentary that is available on the Law Council's website (the 'Australian Solicitors' Conduct Rules 2011 and Commentary' dated August 2013) form part of the final version of the Solicitors' Rules.

We have set out below some specific comments in relation to particular Rules. We will provide any comments we have about the General Uniform Rules and Admission Rules later this month.

### **Rule 4. Other Fundamental Ethical Duties**

Under Rule 4.1.1 solicitors must act in the best interests of a client in any matter in which the solicitor represents the client.

In certain mental health and guardianship matters a solicitor is obliged to act under the instructions of the client even if the solicitor is of the view that those instructions may not be in the client's best interests. For example, a solicitor may observe a client acting in a way that suggests the client is mentally ill, in a situation where the client's instructions are that they want to be released from the

mental health facility immediately. Some relevant commentary attached to Rule 4.1.1 could assist solicitors who undertake this type of work. In this respect Legal Aid NSW notes that Rule 17.3 requires a solicitor not to make submissions or express views on any material evidence or issues in the case in terms which convey the solicitor's personal opinion on the merits of that evidence or issue.

### **Rule 7 – Communication of advice**

Legal Aid NSW supports the inclusion in Rule 7 of a requirement for a solicitor to inform his or her client of any rights the client may have to apply for legal aid unless there is no real possibility that the client is eligible to receive legal aid. This could be worded similarly to Victoria's current Rule 39.2.

### **Rule 9 – Confidentiality**

Under Rule 9.2.5 a solicitor may disclose confidential information where the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person. Legal Aid NSW recommends that this Rule is expanded to also include circumstances where there is a significant risk of the client being financially exploited. The commentary could then provide comment as to when it may be appropriate to seek a financial management order on behalf of the client to prevent such exploitation. Legal Aid NSW would be happy to assist with such an explanatory note.

### **Rule 10 and 11 Conflicts concerning former clients and conflict of duties with current clients**

Legal Aid NSW endorses the approach taken in Rule 10, which recognises that an effective information barrier may be established to avoid a conflict between the duties a solicitor owes to current and former clients. Legal Aid NSW suggests that any commentary to be provided in relation to Rule 10 specifically refers to the suitability of information barriers to allow for the provision of an extensive advice-only service.

Legal Aid NSW provides brief advice-only services to clients to inform them of their legal rights and actions to be taken to resolve their legal problems. In some circumstances, the advice may lead to continuing legal representation in the particular matter, but this does not occur in most cases.

In opening the National Access to Justice and Pro Bono Conference in 2006, the Chief Justice of NSW, the Honourable Murray Gleeson, highlighted the importance of legal advice services in giving practical information about the law and thereby promoting access to justice. His Honour acknowledged the need and entitlement of disadvantaged people to legal advice services and the 'immeasurable benefit' of the role played by legal aid commissions and community legal services. He noted the importance of competent and impartial legal advice in maintaining the administration of justice, and that the significant increase in self-represented litigants has raised difficulties for courts and tribunals. While an advice-only legal service cannot resolve the difficulties created by self-represented litigants, practical, competent and impartial legal advice from a legal practitioner can play a role in facilitating the proper administration of justice.

The availability of the advice-only services is much wider than the availability of grants of legal aid. Legal Aid NSW does not apply a means test or policy eligibility requirements to its advice-

only services, and provides significant numbers of these services every year. In 2013-14 Legal Aid NSW provided 98,939 advice-only services.

As most clients of Legal Aid NSW are unable to pay the cost of private legal representation, the inability to provide legal services due to a conflict would have a very significant impact on the client, who may be unable to access legal services any other way. This is a particular issue in disadvantaged and remote areas. For socially and economically disadvantaged members of the community, it may mean that the person does not receive any legal services at all, if Legal Aid NSW is unable to assist them.

Legal Aid NSW, therefore, welcomes the inclusion in Rule 10 of a reference to effective information barriers allowing a solicitor or law practice to act for two clients in circumstances where there would otherwise be a conflict. Legal Aid NSW suggests that any commentary to the Rules could specifically refer to the fact that advice-only services, due to their limited nature, are particularly suitable for the establishment of effective information barriers allowing a service provider to provide legal advice services to a greater number of clients, thereby providing socially and economically disadvantaged members of the community with greater access to justice.

### **The heading for Rules 30 to 33**

We suggest the current heading, “Relations with other Solicitors” is changed to “Relations with other legal practitioners” because Rules 30 to 33 cover relations with barristers as well as with solicitors. Rules 30 and 31 should be altered to also refer to “legal practitioners” for the same reason.

### **Rule 31 – Inadvertent disclosure**

Legal Aid NSW welcomes the inclusion of Rule 31. It avoids complications which may arise in the making of orders for the rectification of inadvertent disclosure and the return of the documents.

This approach is important as it promotes the professional and ethical obligations of legal practitioners to assist the court and support the proper administration of justice.

### **Rule 33 – Communication with another solicitor’s client**

In relation to Rule 33.1, a comment to the Rule could include reference to the unethical practice of ‘gaol trawling’ (solicitors visiting gaols with the purpose of poaching other solicitors’ clients). This is an ongoing concern for Legal Aid NSW and can have considerable costs implications for legal aid commissions.

### **Rule 37 – Supervision of legal services**

Legal Aid NSW supports this Rule and recommends a comment on the Rule that clarifies that the requirement for a solicitor to exercise reasonable supervision over solicitors and other employees engaged in the provision of the legal services extends to exercising reasonable supervision over the preparation of any bill of costs or invoice. A solicitor should not be able to evade accepting responsibility for any error made in preparing bills or invoices.

Thank you for the opportunity to make these submissions. Legal Aid NSW would be happy to be involved in any further development of the Commentary to the Rules particularly in the areas identified in this submission. If you would like further information, please contact Aideen McGarrigle on 9219 5701 or at [aideen.mcgarrigle@legalaid.nsw.gov.au](mailto:aideen.mcgarrigle@legalaid.nsw.gov.au)